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NO. 80-2134

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

FOREMOST INSURANCE COMPANY AND SHIRLEY ELISER,

Petitioners,

Versus

PANSY F. RICHARDSON, DONALD B. RICHARDSON, PATRICK S. RICHARDSON, JOSEPH S. RICHARDSON, LARRY S. RICHARDSON, CARLA RICHARDSON, AND JUNE G. ALLEN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS

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QUESTION PRESENTED

Whether the admiralty jurisdiction of the Federal Courts encompasses a collision between two pleasure boats on navigable water resulting from the failure of one or both pilots of said vessels to observe established federal navigational rules.

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STATEMENT OF THE CASE

Respondents adopt the petitioners' statement of the case with the following exceptions and/or additions:

A. Respondents do not agree with petitioners' analogy of the United States Court of Appeals, Fifth Circuit's decision where it is stated that the Fifth Circuit abandon any requirement that the complained of activity have any connection to commerce or did not imply any commercial requirement in defining "traditional maritime activity." Respondents further feel that said evaluation is improper to assert in a statement of the case.

B. Respondents likewise do not agree with petitioner's analogy of the Supreme Court decision in Executive Jet, Inc., v. City of Cleveland, Ohio, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454, as mandating some "commercial connection to the location of the wrong," nor do respondents feel that said analogy is properly asserted in a statement of the case.

C. Respondents wish to point out that the collision involved in this case occurred between two

pleasure vessels, one southbound and the other northbound, when, upon meeting in the river, one or both operators turned their respective boats to the left and toward each other instead of outward toward the banks of the river.

D. Finally, respondents wish to point out that the collision complained of in this case occurred on a navigable body of water, the Amite River, at a point susceptible to commerce albeit seldom used for commercial activities.

SUMMARY OF ARGUMENT

The Court of Appeals for the Fifth Circuit correctly held admiralty jurisdiction applicable to a collision between two pleasure boats upon the Amite River arising out of the failure of one or both operators of said pleasure boats to observe established navigational rules. The decision correctly applied the principles established in Executive Jet Aviation, Inc., v. City of Cleveland, Ohio, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454, even assuming a broad interpretation of said case's holding. The Fifth Circuit's decision recognizes a federal interest in protection of navigation on a navigable water,

promotes uniformity of navigational rules on navigable bodies of water, and makes jurisdiction readily ascertainable to the parties involved in a collision upon navigable waters.

ARGUMENT

Prior to the Supreme Court's decision in Executive Jet Aviation, Inc., v. City of Cleveland, Ohio, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972), there was no serious question as to admiralty jurisdiction encompassing a case involving a collision between two pleasure boats on a navigable body of water. All three previous Supreme Court decisions dealing with pleasure craft were decided as being within that admiralty jurisdiction. Levinson v. Deupree, 345 U.S. 648, 97 L.Ed. 1319, 73 S.Ct. 914 (1953), a wrongful death action arising out of a collision between two motor boats on the Ohio River; Coryell v. Phipps, 317 U.S. 406, 63 S.Ct. 291, 87 L.Ed. 363 (1943), an action by the owner of a pleasure boat for damages from fire on said pleasure craft; and Just v. Chambers, 312 U.S. 383, 85 L.Ed. 903, 61 S.Ct. 687 (1941), an action arising from carbon monoxide poisoning in a cabin cruiser.

The question becomes to what extent did Executive Jet Aviation, Inc., v. City of Cleveland, Ohio, (supra), modify these earlier Supreme Court decisions as they affect the definition of admiralty jurisdiction when applied to pleasure boat torts. The most narrow interpretation of that case would simply hold that maritime locality alone is not a sufficient predicate for admiralty jurisdiction in aviation tort cases but that in said aviation tort cases the wrong must bear a significant relationship to traditional maritime activities. Clearly, under such a narrow interpretation, Executive Jet Aviation, Inc., v. City of Cleveland, Ohio, (supra), would have little effect upon the prior Supreme Court cases dealing with pleasure craft. If interpreted broadly, the case holds that in determing whether admiralty jurisdiction exists in any tort claim, there must be a significant relationship between the wrong and traditional maritime activities.

Even assuming that such a broad interpretation was intended, admiralty jurisdiction should be properly concluded under the facts of this case since the wrong bears a significant relationship to traditional

maritime activity. Those facts undisputedly reveal that a collision occurred between two pleasure boats on navigable water directly caused by the failure of one or both pilots of said pleasure boats to observe uniformly established "rules of the road" for navigation on water bodies by all vessels, commercial or otherwise. There is a compelling federal interest in protection of navigation on navigable waters. Such an interest establishes a historical as well as a present significant relationship to traditional maritime activity. In Executive Jet Aviation, Inc., v. City of Cleveland, Ohio, (supra), the Supreme Court recognized the connection between the regulation of vessels on navigable water and traditional maritime activities when the Court states as follows (p. 270):

> "The law of admiralty has evolved over many centuries, designed and molded to handle problems of vessels relegated to ply the waterways of the world, beyond whose shores they cannot go. That law deals with navigational rules . . . rules that govern the manner and direction those vessels may rightly move upon the waters. When a collision occurs or a ship founders at sea, the law of admiralty looks to these rules to determine, fault, liability, and all other questions that may arise from such a catastrophe."

Congress has recognized a strong federal interest and nexus to traditional maritime activities being apparent where violation of navigational rules are at issue. Federal law has for many years provided statutory navigational safety rules and has so defined vessels under said rules to make them applicable to pleasure crafts. 1 U.S.C. §3 (1970); 33 U.S.C. §§151-232 (1957); 33 U.S.C. §§241-295 (1958); 33 U.S.C. §§302-356 (1958). Kelly v. Smith, 485 So.2d 520 (5th Cir. 1973); St. Hilaire Moye v. Henderson, 496 F.2d 973 (8th Cir. 1974).

In addition, the U.S. Coast Guard is charged with the duties of investigating accidents upon navigable waters, rescuing those in difficulty upon said waters and in general enforcing the "rules of the road." In an attempt to see that the Coast Guard's functions not be needlessly hazardous, Congress has sought to further said federal interest by the enactment of regulations pertaining to the type of equipment that must be carried on all vessels, pleasure or otherwise. Federal Motorboat Act of 1940, 46 U.S.C. 526 (1940).

In addition to the traditional maritime nexus arising out of the federal interest in regulation of

navigation upon navigable waters, there is a federal interest and maritime nexus in seeing that bodies of water susceptible to commerce are free from obstacles that would impede said commerce. The record preponderates to the legal conclusion that the collision occurred on navigable waters as defined in the time-honored case, The Daniel Ball, 77 U.S. (10 Wallace) 557, 19 L.Ed. 999 (1870), p. 563:

> "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition as highways of commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. They constitute navigable waters of the U.S. within the meaning of the acts of Congress, in contradiction from the navigable waters of the states, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries in their customary modes in which said commerce is conducted by water."

The Amite River meets the definition of navigability as outlined above. The data from the Corps of Engineers (R81-83) not only reveals the Amite River to be navigable but also points out that a federal project was conducted to provide the reasonable

demands of commerce on said river and to provide a channel for commerce from the Amite River through Lake Maurepas to the Gulf of Mexico. The Department of Army report (R103-119 at 105) shows the depth of the Amite River near the point of collision in April, 1977, to be eight feet, within a range permitting commercial vessel use. Finally, the report of the Department of Transportation of the State of Louisiana (R136-139) reveals numerous openings of the bridges for vessels along the Amite River near the point of collision, indicating commercial activity upon said river. These records show the Amite River to be susceptible to commerce if not in fact used for commerce. The Amite River in connection with Lake Borne and Lake Pontchatrain provide a navigable route for commercial activity through the state to the Gulf of Mexico and to foreign waters. No one would dispute that traditional maritime nexus encompasses the establishment of rules for navigation to promote the free flow of goods and services on waters susceptible to commerce.

Most district and appellate post Executive Jet cases are consistent in holding where injuries result

from a disregard of proper navigational rules or from obstacles impeding navigation, a traditional maritime nexus is found sustaining admiralty jurisdiction. Gilmore v. Witschorek, 411 F.Supp. 491, (E.D. Ill., 1976), held that federal admiralty jurisdiction encompassed a collision between two pleasure boats on navigable water in a wrongful death case. Kayfetz v. Walker, 404 F.Supp. 75 (D.C. Conn. 1975), upheld admiralty jurisdiction where the injuries complained of arose out of a collision between two sailing yachts during a sporting race. St. Hilaire Moye v. Henderson, (supra), held admiralty jurisdiction available where a passenger in a pleasure boat was thrown into the water and injured when the operator of the pleasure boat placed the boat in reverse gear while traveling forward.

Several cases have upheld admiralty jurisdiction where pleasure boats encountered certain navigational hazards. A pleasure craft crashed into a sunken barge on an inland river in Lane v. U.S., 529 F.2d 175 (4th Cir. 1975); a skier behind a pleasure boat crashed into the submerged edge of a barge in Kaiser v. Travelers Insurance Co., 359 So. 90, (E.D. La. 1973);

a pleasure boat incurred damage by an oil spill in the Santa Barbara Channel in Oppen v. Aetna Insurance Co., 485 F.2d 262 (9th Cir. 1973); a pleasure boat struck an unlit flare piping in Gere v. Chevron Oil Co., 574 F.2d 243 (5th Cir. 1978). In Brown v. U.S., 403 F.Supp. 472 (C.D. Ca. 1975) a man was killed when the mast of his pleasure boat struck a low power line strung across the Colorado River. The court considered the power line an impediment to navigation. All these courts found that the harm encountered bore a significant relationship to traditional maritime activity, i.e., navigation; likewise, a fortiori, in regard to a collision occurring between two pleasure boats on navigable waters. A collision between two vessels in navigable waters presents a potential danger to all vessels, pleasure and commercial, which are engaged in navigation. It is submitted that where dangers or obstacles to maritime commerce or navigation are presented or generated, or where maritime navigational "rules of the road" are violated, a sufficient relationship to traditional maritime activity should be found to exist and a federal interest is served by having said cases decided under federal

admiralty law.

The proper focus of maritime law should be upon waterbound vessels, pleasure or otherwise, rather than upon water borne commerce also. This is true because there is a federal interest in protecting navigation and commerce on navigable waters since water borne vessels, whether commercial or non-commercial, clearly create a potential threat to navigation and commerce. Admiralty Jurisdiction Over Pleasure Craft Torts, 36 Md. L.R., p. 225.

The cases of Adams v. Montana Power Co., 528 F.2d 437 (9th Cir. 1975); Chapman v. United States, 575 F.2d 147 (7th Cir. 1978); and Livingston v. U.S., 627 F.2d 1965 (8th Cir. 1980), holding no admiralty jurisdiction, can be distinguished from the above-cited cases since the bodies of water involved therein were deemed non- traversable by commercial vessels and thus non-navigable within the definition of The Daniel Ball, (supra).

The Fifth Circuit in Kelly v. Smith, (supra), in light of the Supreme Court case of Executive Jet Aviation, Inc., v. City of Cleveland, Ohio, (supra), established four factors to consider in determining

whether the wrong bears a sufficient relationship to a traditional maritime activity in tort claims on navigable water involving pleasure boats. An analysis of those factors in light of the factual situation of this case reveals a clear nexus to traditional maritime activity. In regard to the factor of function and role to the parties, both parties were actively engaged in the navigation of their vessels, although for pleasure. Secondly, regarding the type of vessels and instrumentality involved, both vessels were pleasure boats; however, no non-navigable vessel or instrumentality was involved in the collision. Thirdly, regarding the causation factor, the collision and resulting injuries resulted from the failure of one or both of the pilots of the pleasure vessels to regard the proper rules for navigation established under federal laws and applicable to the pleasure boats. Finally, regarding the factor described as "the traditional concept of the historical role of admiralty jurisdiction," courts have recognized that admiralty affords remedies to those injured while traveling navigable waters, especially due to error of navigation. St. Hilaire Moye v. Henderson, (supra).

Respondent agrees with the majority of the lower federal courts' interpretation of Executive Jet Aviation, Inc., v. City of Cleveland, Ohio, (supra), requiring the finding of a significant relationship to traditional maritime activity in addition to the locality requirement for all torts occurring between pleasure boats. The test is fair and has proved to limit admiralty jurisdiction to cases of federal interest and traditional maritime activity. Under the factual situation, the present case clearly falls within the interpretation of said test. The nexus to traditional maritime activity is apparent where violations of navigational rules are at issue.

In addition to the existence of a nexus to traditional concepts of maritime activities where a collision involving failure to apply proper navigational rules by pleasure boat operators occurs on navigable waters, policy consideration militates toward upholding admiralty jurisdiction in such cases. This policy stems from the national interest in uniformity of navigational rules and the judicial interest in providing a readily ascertainable jurisdiction for all those individuals subjected to the hazards of

waterbound transportation on our navigable river "the highways of admiralty" as stated most clearly in the case of St. Hilaire Moye v. Henderson, (supra), p. 979:

> "The navigation of waterbound vessels in those waters, even if not directly engaged in commerce themselves, presents a potential danger to the operation of vessels which are engaged in commerce on said waters. This is the very basis of law requiring vessels used on navigable waters to meet certain safety and operational standards. The law of admiralty must surely cover the operation of vessels which present potential danger to commerce on navigable waters."

The enactment of federal navigational and safety rules and their applicability to all vessels, pleasure or commercial, established a congressional intent to provide for uniformity of these rules on all navigable waterways for the enhancement of commerce and safety. The exclusion of pleasure boats from admiralty tort jurisdiction while keeping said boats under federal navigational rules would frustrate a recognized federal policy and federal interest in protection of navigation on navigable waters. Admiralty Jurisdiction Over Pleasure Craft Torts, 36 Md. L.R. 212 (1976), p. 229. The Fifth Circuit, in its decision, recognized this need for uniformity and ascertainability of jurisdiction (J. A. 33-38).

If the court were to believe the appellant's argument and predicate admiralty jurisdiction upon commercial activity, all types of conflicts and uncertainties would arise, destroying the recognized federal interest in uniformity. In collisions involving non-commercial navigators and non-commercial vessels, there could be fifty different sets of navigational rules whose applicability would depend upon the location of the collision in reference to the territorial jurisdiction of each state within the United States. There could be different sets of navigational rules for such non-commercial vessels on the same navigable body, i.e., the Mississippi River, depending upon which state you happen to be in at the time of the mishap.

Likewise, with different navigational rules for commercial vessels (federal rules of the road) as opposed to non-commercial vessels (state rules), it might not be readily ascertainable prior to a collision between a pleasure vessel and a commercial vessel as to the true nature of each vessel's activity, commercial or pleasure, and thus what proper navigational rule would govern the situation. In many

cases, the correct rule of navigation could not be accurately determined by the parties prior to the collision in an effort to apply the proper navigational rules to avoid the same but could be determined only by the court at trial after the collision, depending upon the evidence presented as to the nature of a vessel's activity, i.e., being sufficiently commercial so as to invoke a federal navigational rule, or purely pleasurable, thus invoking state rules of navigation. Further, a vessel, although appearing commercial when seen upon the navigable water, might later turn out to be purely pleasurable, invoking a different set of navigational rules since said commercial-appearing vessel was not at the time of the collision engaged in commercial activity and possibly had not been engaged in said activity for quite some time. In the same light, a bass boat might seem purely pleasurable to the naked eye; but due to the fact that the fish being caught are sold to seafood outlets, it would thus be engaged in commercial activities, and different navigational rules would apply. Havoc would result. In order to keep the roads of admiralty free for commerce without restraint, it is imperative that uniform

admiralty law extend to non-commercial as well as to commercial navigators on those bodies of water susceptible to commerce and commercial activity. Even Professor Stolz, who is quoted extensively by petitioners in their brief, recognized the need for uniformity of navigational rules when he stated as follows regarding the scope of admiralty jurisdiction:

> "Clearly a federal interest exists with respect to such a matter as the rules of navigation, rights-of-way, and lights to be carried, which must necessarily control both big ships and little ships and as to which there is a clear virtue in national uniformity." P. 663.

The easiest case for an application of federal law to pleasure boating involves the rules of the road, such as rules of passing and turning, rules of right-of-way, and rules concerning running lights. By the terms of the federal statute, these rules are applicable to all vessels on navigable waters, and the rules of necessity must be applicable to pleasure boats. It would be intolerable to have conflicting rules on any particular body of water. Pleasure Boating and Admiralty: Erie at Sea, 51 Cal. L.R., pp. 712-713.

Further, as stated by the Fifth Circuit in its decision (J.A. 36-37), it would be introducing another note of uncertainty to hold that admiralty jurisdiction extends only to stretches of navigable water that presently function as commercial arteries. It would place too great a burden on pilots of navigable bodies to ascertain commercial activity at each point during navigation. It is clear that the federal interest in uniformity must be far broader than merely commercial maritime traffic given the policy adopted by the Supreme Court on the matter of federal interest. Executive Jet Aviation, Inc., v. City of Cleveland, Ohio, (supra), pp. 269-270.

There is a most significant consideration that both private and commercial vessels operate upon the same medium; hence, a uniform set of rules of the road is virtually required to regulate operations. To this extent, federal rules should be controlling.

> "It would be highly inconsistent to have created a separate body of law for maritime commerce in order to provide uniformity and predictability for legal affairs because those affairs are primarily interstate and international, and at the same time exclude vessels having the same extent of operation simply because those operations are not for

profit." Admiralty Jurisdiction Over Pleasure Craft Torts, 36 Md. L.R., p. 278.

Jurisdiction should be as readily ascertainable as courts can make it, and jurisdiction is made readily ascertainable by having federal admiralty law and its navigational rules applicable to all tort activity involving disregard of federal navigational rules upon navigable waters.

CONCLUSION

Admiralty jurisdiction should encompass a collision between two pleasure boats on navigable waters arising out of the failure of the pilots of said boats to heed federally established navigational rules. Admiralty law has traditionally been concerned with furnishing remedies for those traveling navigable water. To hold otherwise would impede commerce rather than promote it, as was one of the recognized intents of Congress in establishing separate federal admiralty laws. In addition, policy considerations of uniformity of navigational law, established federal interest with the uniformity of these laws, and policy considerations ensuring a readily ascertainable jurisdiction militates toward upholding admiralty

jurisdiction for all vessels colliding on navigable waters. The benefits derived from the uniformity of navigational rules and jurisdiction outweigh any justification for the maintenance of state comity and application of individual state rules and procedure.

A decision by this Court upholding admiralty jurisdiction as applied to the facts of this case does not extend or distort the traditional concept of admiralty jurisdiction but only recognizes that a traditional maritime nexus exists in regulating navigation upon our navigable waters.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Brief of Respondent has been served on the Honorable Arthur Howell Andrews, Franklin, Moore & Walah, P. O. Box 3958, Baton Rouge, LA 70821, counsel of record for petitioners, Foremost Insurance Company and Shirley Eliser, and on the Honorable Victor L. Marcello, Talbot, Sotile, Carmouche, Marchand & Marcello, P. O. Drawer 669, Donaldsonville, LA 70346, counsel of record for June P. Allen, by depositing said copies in the United States mail, postage prepaid and properly addressed, this 18th day of December, 1981. I further certify that all parties required to be served have been served.

DORSEY C. MARTIN, III